



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

IN REPLY REFER TO:
7202.4-OS-2018-01077

December 19, 2018

Via email: 52733-52909008@requests.muckrock.com

Jimmy Tobias
DEPT MR 52733
411A Highland Ave
Somerville, MA 02144-2516

Dear Mr. Tobias,

On April 23, 2018, you filed a Freedom of Information Act (FOIA) request seeking the following:

All email correspondence, including attachments, between DOI Press Secretary Heather Swift and Energy counselor Vincent DeVito between April 11, 2018 and the date this request is processed.

On July 16, 2018, we acknowledged your request and advised you of your fee status under the FOIA. Accordingly, we are writing today to respond to your request on behalf of the Office of the Secretary. This completes the Office of the Secretary's response.

Please find attached one file consisting of 72 pages. Of those 72 pages, 55 pages are being released in full and 17 pages contain redactions as described below.

Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)) under the following privileges:

Deliberative Process

Confidential Commercial Information

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Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” 5 U.S.C. § 552(b)(5). As such, the Exemption 5 “exempt[s] those documents... normally privileged in the civil discovery context.” National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The exemption incorporates the privileges that protect materials from discovery in litigation. These privileges include deliberative process, confidential commercial information, attorney work-product, and attorney-client. See *id.*; see also Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979) (finding a confidential commercial information privilege under Exemption 5).

Deliberative Process Privilege

The deliberative process privilege “protects the decisionmaking process of government agencies” and “encourages the frank discussion of legal and policy issues” by ensuring that agencies are “not forced to operate in a fishbowl.” Mapother v. United States Dep’t of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citing Wolfe v. United States Dep’t of Health & Human Services, 839 F.2d 768, 773 (D.C. Cir. 1988)). Three policy purposes have been advanced by the courts as the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. See Coastal States Gas Corp. v. United States Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege protects materials that are both predecisional and deliberative. Mapother, 3 F.3d at 1537; Access Reports v. United States Dep’t of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). A “predecisional” document is one “prepared in order to assist an agency decisionmaker in arriving at his decision,” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1089, 1093 (9th Cir. 1997). A predecisional document is part of the “deliberative process” if “the disclosure of [the] materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

Those portions of the documents that have been withheld pursuant to the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open

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discussions among employees of the Department of the Interior. Therefore, their content has been held confidential by all parties. Public dissemination of this information would have a chilling effect on the agency's deliberative processes; it would expose the agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine its ability to perform its mandated functions.

Confidential Commercial Information Privilege

When the government enters the marketplace as an ordinary commercial buyer or seller, the government information is protected from competitive disadvantage under Exemption 5. Government Land Bank v. General Services Administration, 671 F.2d 663, 665 (1st Cir. 1982). Exemption 5 prevails "where the document contains 'sensitive information not otherwise available,' and disclosure would significantly harm the government's commercial interest." Id. at 666; see also Merrill, 443 U.S. at 363.

Pursuant to the confidential commercial information privilege, conference call codes and passcodes have been withheld under Exemption 5. This information constitutes "intra-agency" documents because they are only shared with members of the Department of the Interior for the purpose of conducting official government business. Moreover, this information qualifies as "confidential commercial information" because the government entered the marketplace as an ordinary commercial buyer.

In line with Land Bank and Merrill, the information is "sensitive and not otherwise available." If the information was released, the government's financial interest would be significantly harmed. The conference calls would no longer be private since unknown, non-governmental parties would have the ability to listen in to the calls. The funds spent on purchasing the information would therefore be wasted, and the information would be of no use.

Because we reasonably foresee that the release of this information would significantly harm the government's financial interest by publicizing sensitive information, the Office of the Secretary is withholding it in accordance with Exemption 5 of the FOIA.

Portions of the enclosed documents have been redacted pursuant to Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)) because they fit certain categories of information:

Email addresses

Phone numbers

Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The courts have held that the phrase "similar files" involves all information that applies to a particular person. Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003).

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To determine whether releasing requested information would constitute a clearly unwarranted invasion of personal privacy, we are required to perform a “balancing test.” This means that we must weigh the individual’s right to privacy against the public’s right to disclosure.

- (1) First, we must determine whether the individual has a discernable privacy interest in the information that has been requested.
- (2) Next, we must determine whether release of this information would serve “the public interest generally” (i.e., would “shed light on the performance of the agency’s statutory duties”).
- (3) Finally, we must determine whether the public interest in disclosure is greater than the privacy interest of the individual in withholding.

The information that we are withholding consists of names of third parties, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency’s statutory duties and that, on balance, the public interest to be served by its disclosure does not outweigh the privacy interest of the individuals in question, in withholding it. Nat’l Ass’n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

In summation, we have determined that release of the information that we have withheld would constitute a clearly unwarranted invasion of the privacy of these individuals, and that it therefore may be withheld, pursuant to Exemption 6.

We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA’s general rule of disclosure.

Jennifer Heindl, Attorney-Advisor, in the Office of the Solicitor, was consulted in reaching this decision. Clarice Julka, Office of the Secretary FOIA Officer, is responsible for making this decision.

Appeals

You may appeal this decision to the Department’s FOIA/Privacy Act Appeals Officer. If you choose to appeal, the FOIA/Privacy Act Appeals Officer must receive your FOIA appeal **no later than 90 workdays** from the date of this final letter responding to your FOIA request. Appeals arriving or delivered after 5 PM Eastern Time, Monday through Friday, will be deemed received on the next workday. **Your appeal must be made in writing** and addressed to:

Attn: FOIA/Privacy Act Appeals Officer

Mr. Jimmy Tobias

U.S. Department of the Interior
Office of the Solicitor
1849 C Street, N.W.
MS6556 MIB
Washington, D.C. 20240

Fax: 202-208-6677

E-mail: FOIA.Appeals@sol.doi.gov

You must include with your appeal copies of all correspondence between you and the Office of the Secretary concerning your FOIA request, including a copy of your original FOIA request and the response letter. You must also include, in as much detail as possible, an explanation of why you believe the Office of the Secretary's response was in error. Failure to include this documentation with your appeal will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Officer determines (in her sole discretion) that good cause exists to accept the defective appeal. All communications concerning your appeal, including envelopes, should be clearly marked with the words "FREEDOM OF INFORMATION APPEAL." The appeal should include your name, mailing address, daytime telephone number (or the name and telephone number of an appropriate contact), email address, and fax number (if available) in case the Department needs additional information or clarification. For more information on FOIA administrative appeals, including how the Department will respond to your appeal, please refer to Subpart H of the Department's FOIA regulations, 43 C.F.R. § 2.57-§ 2.64.

Fees

We do not bill requesters for FOIA processing fees when their fees are less than \$50.00, because the cost of collection would be greater than the fee collected. (see 43 C.F.R. § 2.37(g)). Therefore, there is no billable fee for the processing of this request.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered

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a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS in any of the following ways:

The National Archives and Records Administration
Office of Government Information Services
8601 Adelphi Road- OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Web: <https://ogis.archives.gov>
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Please note that using OGIS services does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer.

You may also seek dispute resolution services from our FOIA Public liaison, Clarice Julka, by email at os.foia@ios.doi.gov, or by phone at 202-513-0765.

If you have any questions about our response to your request, you may contact Leah Fairman by phone at 202-513-0765, by fax at 202-219-2374, by email at os.foia@ios.doi.gov, or by mail at U.S. Department of the Interior, 1849 C Street, NW, MS-7328, Washington, D.C. 20240.

Sincerely,

Ryan McQuighan
Office of the Secretary
Acting FOIA Officer

Electronic Enclosure